No. 80-850

IN THE

Supreme Court of the United States

October Term, 1980

ELIE JONES, Warden, Stone Mountain Correctional Institution,

Appellant,

v.

BOBBY H. HELMS,

Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR APPELLANT

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QUESTON PRESENTED

Whether, under the Equal Protection Clause of the Fourteenth Amendment, a State, in furtherance of its compelling interests in protecting its children and in enforcing its criminal laws, may enact a statute which provides that a person who commits the crime of child abandonment, before or after leaving the State, is guilty of a felony, whereas a person who commits the crime of child abandonment without leaving the State is guilty of a misdemeanor?

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OPINION BELOW

The opinion of the Court of Appeals is reported at 621 F.2d 211. A copy of the opinion is set forth in the Joint Appendix at A.32.

JURISDICTION

The decision of the Court of Appeals was entered on July 11, 1980. A notice of appeal was filed on September 19, 1980, and this Court noted probable jurisdiction on January 26, 1981.

The jurisdiction of this Court is conferred by Title 28, United States Code, Section 1254(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Section I, Fourteenth Amendment to the Constitution:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GEORGIA STATUTES

Ga. Code § 74-9902:

> **74-9902 (116 P.C.) Abandonment of child**
>
> (a) If any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, he or she, as the case may be, shall be guilty of a misdemeanor: Provided, however, if any father or mother shall wilfully and voluntarily abandon his or her child,

either legitimate or illegitimate, leaving it in a dependent condition, and shall leave this State, or if any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, after leaving this State, he or she, as the case may be, shall be guilty of a felony and shall, upon conviction, be imprisoned in the penitentiary for not less than one nor more than three years, which shall be reducible to a misdemeanor. The wife and husband shall be competent witnesses, in such cases to testify for or against the other. The mother and the alleged father of the child, either legitimate or illegitimate, shall be competent witnesses in such cases to testify for or against each other, notwithstanding the fact that such testimony may relate to adultery by either the mother or the father which may have resulted in the conception of the child. A child thus abandoned by the father or mother shall be considered to be in a dependent condition when the father or mother charged with the offense does not furnish sufficient food, clothing or shelter for the needs of the child. The offense of abandonment shall be and is hereby declared to be a continuing offense. Former acquittal or conviction of said offense shall not be a bar to further prosecution therefor under this section, if it shall be made to appear that said child was in a dependent condition as defined herein for a period of 30 days prior to the commencement of prosecution.

(b) Provided, however, that any person, upon conviction of the third offense for violating the provisions of this section, shall be guilty of a felony and shall, upon

conviction thereof, be imprisoned in the penitentiary for not less than one nor more than three years, which felony shall not be reducible to a misdemeanor by any judge presiding at the trial as provided in section 27-2501.

(c) Provided, however, if during the trial of any person charged with the offense defined in this section, such person contends that he or she is not the father or mother, as the case may be, of the child alleged to have been abandoned, the trial judge shall charge the jury that if its verdict is for the acquittal of such person, and that its reason for so finding is that such person is not the father or mother of the child alleged to have been abandoned, that its verdict shall so state, or if the person charged with the offense defined in this section is tried before the court without the intervention of the jury and the court renders a verdict of acquittal based on the contention of such person that he or she is not the father or mother, as the case may be, of the child alleged to have been abandoned, the trial judge shall so state this fact in his verdict of acquittal. In the event the verdict of the jury or the court shall be for acquittal of such person, and its reason for so doing is that such person is not the father or mother of the child alleged to have been abandoned, such person cannot thereafter again be tried for the offense of abandoning said child, and said verdict shall be a bar to all civil and criminal proceedings attempting to compel such person to support said child.

(d) In prosecutions under this section, when the child is illegitimate, and the accused father is convicted, the accused father shall be required by the court to pay the reasonable medical expenses paid by or incurred on

behalf of the mother due to the birth of the child.

(e) The accused father and the mother of the illegitimate child may enter into a written agreement providing for future support of the child by regular periodic payments to the mother until such child reaches age 18 years, marries, or becomes self-supporting: Provided, however, such agreement shall not be binding on either party until it has been approved by the court having jurisdiction to try pending cause.

(f) Upon the trial of the accused father under this section, it shall be no defense that the accused father has never supported the child.

(g) In prosecutions under this section, when the child is illegitimate, the venue of the offense shall be in the county in which the child and the mother are domiciled at the time of the swearing out of the arrest warrant, but if the child and the mother are domiciled in different counties, venue shall be in the county in which the child is domiciled.

(h) In the trial of any abandonment proceeding in which the question of parentage arises, regardless of any presumptions with respect to parentage, the accused father may request a paternity blood test and agree and arrange to pay for same; and in such cases the court before which the matter may be brought, upon pretrial motion of the defendant, shall order that the alleged parent, the known natural parent, and the child submit to any blood tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage and which are reasonably accessible to the alleged parent, the known natural parent, and the child. The results of those blood tests and comparisons, including the statistical likelihood of

the alleged parent's parentage, if available, shall be admitted in evidence when offered by a duly qualified, licensed practicing physician, duly qualified immunologist, duly qualified geneticist, or other duly qualified person. Upon receipt of a motion and the entry of an order under the provisions of this subsection, the court shall proceed as follows:

(1) Where the issue of parentage is to be decided by a jury, where the results of those blood tests and comparisons are not shown to be inconsistent with the results of any other blood tests and comparisons, and where the results of those blood tests and comparisons indicate that the alleged parent cannot be the natural parent of the child, the jury shall be instructed that if they believe that the witness presenting the results testified truthfully as to those results and if they believe that the tests and comparisons were conducted properly, then it will be their duty to decide that the alleged parent is not the natural parent.

(2) The court shall require the defendant requesting the blood tests and comparisons pursuant to this subsection to be initially responsible for any of the expenses thereof. Upon the entry of a verdict incorporating a finding of parentage or nonparentage, the court shall tax the expenses for blood tests and comparisons, in addition to any fees for expert witnesses whose testimonies supported the admissibility thereof, as costs.

STATEMENT OF THE CASE

In 1975 Appellee and his wife, both residents of Georgia, were legally separated. Appellee's wife was given custody of the children, and Appellee was ordered to pay

$150.00 per month for the maintenance and support of his daughter. Appellee made no support payments, but left the State of Georgia and moved to Alabama. (A.16). Thereafter, he remained in continuous violation of his court ordered obligations to his child because he made no payments whatsoever for her support.

On February 13, 1976, while visiting his child in Columbus, Georgia, Appellee was arrested for the offense of child abandonment. (A.17). The grand jury of Muscogee County, Georgia, in a special presentment returned on March 19, 1976, formally charged Appellee with the felony of abandoning his child and leaving the State. (A.3). Appellee pled guilty in the Superior Court on March 26, 1976, and was sentenced to a three-year suspended sentence conditioned upon his paying $200.00 per month for the support and maintenance of his child during her minority. (A.6-8). Upon Appellee's release pursuant to his suspended sentence, he immediately left the State of Georgia again and returned to Alabama. When he again failed to make support payments under the court order, a bench warrant was issued for his arrest. (A.17).

Appellee thereafter moved to Florida and established residence in the Fort Lauderdale area. In 1977, Appellee's estranged wife was murdered, and Appellee attempted to regain custody of his daughter in Florida. He was finally successful in doing so, but only after the juvenile court judge had received assurances from the Florida Governor's office that he would not be extradited to Georgia.

Appellee remained in Florida until January, 1978, when he moved to Augusta, Georgia. Because of incidents of public drunkenness and reports of child abuse and neglect by Appellee while in Florida, the Florida caseworkers

were so concerned about the welfare of Appellee's daughter that they alerted the Georgia Department of Human Resources in Augusta of his arrival. Due to Appellee's drinking problem which was threatening the health and safety of his daughter, the Georgia authorities were compelled to seek temporary custody of Appellee's daughter through an emergency court order. (A.19).

Appellee was then arrested by authorities in Augusta on the outstanding bench warrant from Muscogee County. After a June 9, 1978, hearing in which Appellee's suspended sentence was revoked, he was transported back to Columbus, Georgia, and sentenced to serve three years imprisonment. (A.10). Appellee's daughter was placed with a relative in Columbus, Georgia. (A.19).

On November 21, 1978, Appellee filed a habeas corpus action in the DeKalb County Superior Court, challenging the constitutionality of Ga. Code Ann. § 74-9902, Georgia's child abandonment statute, on the grounds that it violated his right to travel under both the Equal Protection and Privileges and Immunities Clauses of the Constitution. The DeKalb County Superior Court denied relief and ordered that the Appellee be remanded to State custody. (A.11). Appellee's application to the Supreme Court of Georgia for a certificate of probable cause to appeal was also denied. (A.20). Appellee then filed, on March 23, 1979, a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the Columbus Division of the United States District Court for the Middle District of Georgia. (A.21).

The District Court decided the case on the briefs which were submitted by both parties, and entered an order on May 4, 1979, denying relief. (A.28). Appellee filed a notice of appeal (A.31); however, the District Court refused to

grant a certificate of probable cause. Subsequently, the Court of Appeals for the Fifth Circuit granted Appellee a certificate of probable cause to appeal, and oral argument was heard on February 25, 1980.

On July 11, 1980, the Court of Appeals entered an order reversing the District Court's denial of the writ of habeas corpus and declaring Ga. Code Ann. § 74-9902 to be violative of the Equal Protection Clause of the Fourteenth Amendment. (A.32). The Privileges and Immunities question was not reached. The Court of Appeals reasoned that the challenged statute impermissibly interfered with Appellee's fundamental right to travel. Further, the Court ruled that the statute was overly broad, since the State could use the Uniform Reciprocal Enforcement of Support Act as a less drastic alternative to Ga. Code Ann. § 74-9902. It is from this order that this appeal is taken.

SUMMARY OF ARGUMENT

This case involves a challenge to that portion of Georgia's child abandonment law which provides that guilty parents who leave the State are felons, whereas those who stay within the State are misdemeanants. The Court of Appeals decided that the statute should be subject to strict scrutiny because it infringed Appellee's fundamental right to interstate travel. Finding that Georgia has no sufficiently compelling State interest which permits distinguishing between nonsupporting parents within or without the State, the Court of Appeals held that the challenged statute was violative of the Equal Protection Clause of the Fourteenth Amendment.

It is Appellant's position that the principles underlying the constitutional right to travel were never intended to

protect an accused criminal from suffering the consequences of his misdeeds. Since an accused criminal's rights to full and free travel are attenuated, the rational basis test should be applied to the challenged statute. The State legislature, which is preeminently responsible for defining and punishing crimes, could reasonably have determined that since abandoning parents who leave the State have made it more difficult for the State to bring them to justice, those parents should be subject to more stringent punishment.

Even if the strict scrutiny test is applied, Georgia's child abandonment statute is more than justified by the State's compelling interest in preventing and punishing the crime of child abandonment. There are few duties of a State that rise to the importance of protecting its helpless children and upholding the integrity of its criminal laws.

This statute is narrowly tailored to reach only those parents who commit the crime of child abandonment; it does not penalize the right of "good" parents to travel and migrate to another state—it only discourages crime. Further, the felony provisions are necessary to aid extradition because of the difficulty in obtaining extradition of misdemeanants. Contrary to the ruling of the Court of Appeals, the Uniform Reciprocal Enforcement of Support Act is not a viable alternative to felony extradition because most states have provisions which allow the absent parent to avoid extradition to face criminal charges by agreeing to pay child support.

The Court of Appeals decision has created a situation where a person can wilfully abandon his child in Georgia, and then, for all practical purposes, avoid prosecution for his crime. The Court of Appeals decision should be reversed.

ARGUMENT

I. THE STATE HAS A COMPELLING INTEREST IN PREVENTING AND PUNISHING THE ABANDONMENT OF CHILDREN WITHIN ITS BORDERS.

When parents abandon or fail to support their children, they have neglected an almost universally recognized duty which, as explained by Blackstone, is based on natural law, rather than on just the law of one jurisdiction:

> "The duty of parents to provide for the *maintenance* of their children, is a principle of natural law; an obligation . . . laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave their children life that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have the perfect *right* of receiving maintenance from the parents." 1 BLACKSTONE, COMMENTARIES, * 447. [Emphasis in original].

It has been the law of Georgia "since the Code of 1863 (§ 1743 now Code § 74-105) that, '[u]ntil majority, it is the duty of the father [1] to provide for the maintenance, protection and education of his child.' " *Murphey v. Murphey*, 215 Ga. 19, 22 (1959).

The provisions regarding abandonment of children under

[1] Georgia's laws relating to intra-familial duties, rights, and obligations underwent a comprehensive modernization in Ga. Laws 1979, pp. 466, *et seq.*, to comply with the standards set forth by this Court in *Orr v. Orr*, 440 U.S. 268 (1979). Today, both parents, absent death, divorce or legal separation, are natural guardians with a co-equal duty to support, and a concomitant right to control, their children. Ga. Laws 1979, pp. 466, *et seq.* (Ga. Code §§ 74-105 and 74-108); Ga. Laws 1976, pp. 688, *et seq.* (Ga. Code § 49-102). Both parents are likewise subject to criminal prosecution for abandonment. Ga. Code § 74-9902; *Hudgins v. The State*, 243 Ga. 798 (1979).

attack in this case are part of Georgia's comprehensive statutory regulation of domestic relations, an area which has long been regarded as a virtually exclusive province of the State. *See, e.g., Popovici v. Agler*, 280 U.S. 379, 383 (1930) (Holmes, J.); *Buechold v. Ortiz*, 401 F.2d 371, 372 (9th Cir. 1968). One of the purposes of Georgia's laws on abandonment is to insure that children are provided for by their natural parents. *Perini v. The State*, 245 Ga. 160, 161 (1980).

Georgia provides that parents who wilfully and voluntarily abandon their children,[2] and leave them in a dependent condition,[3] are guilty of a misdemeanor. On the other hand, parents who wilfully and voluntarily abandon their children, leave them in a dependent condition, and then depart the State, are guilty of a felony. Similarly, when the abandonment occurs after the parents have left the State, they are also guilty of a felony. These two felony offenses carry sentences of imprisonment in the penitentiary for not less than one nor more than three years, but a felony conviction may, within the judge's discretion,[4] be reduced to a misdemeanor.[5] Ga. Code

[2] "Children" as used in Ga. Code § 74-9902, and herein, refers to both legitimate and illegitimate children.

[3] A child need not be totally destitute or on public welfare to be considered in a dependent condition. Evidence that the custodial parent or relative has difficulty in providing necessaries for the child is sufficient. *Fincher v. The State*, 153 Ga. App. 190 (1980). The fact that one parent continues to support the child is no excuse for the one who doesn't. *Carnegie v. State*, 246 Ga. 187 (1980).

[4] Ga. Code § 74-9902(a); *see also*, Ga. Code Ann. § 27-2501, which provides that: "All felonies . . . [with exceptions not pertinent hereto] shall be punished by imprisonment and labor in the penitentiary for the term set forth in the several sections in this Code prescribing the punishment of such offenses; but on the recommendation of the jury trying the case, when such recommendation is approved by the judge presiding on the trial, said crimes shall be punished as misdemeanors. If the judge trying the case sees proper, he may, in fixing the punishment, reduce such felonies to misdemeanors." [Bracketed matter added].

[5] Misdemeanors are generally punished either: (a) by a fine not to

§ 74-9902(a). However, a person who is convicted of child abandonment for the third time is guilty of a felony which cannot be reduced to a misdemeanor. Ga. Code § 74-9902(b).

Clearly, Georgia may place criminal sanctions on parents who forego their duties to their children in order to effectuate both its interest in protecting its children and deterring and punishing anti-social conduct.[6] Nor is there any serious question as to whether a state may assess such penalties on a person who may be a non-resident, if his child is intentionally left in an abandoned, dependent condition within the state.[7]

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exceed $1,000 or by confinement in the county or other jail, county correctional institution or other such places as counties may provide for maintenance of county prisoners for a total term not to exceed twelve months, either a fine or confinement or both; or (b) by confinement under the jurisdiction of the State Board of Corrections in the State penitentiary, in a county correctional institution or such other institutions as the Director of Corrections may direct, for a determinate term of months which shall be more than six months but shall not exceed the total term of twelve months. Ga. Laws 1865-6, p. 233, as amended [Ga. Code Ann. §§ 27-2506(a) and (b)].

[6] State courts have long been nearly unanimous in taking the view that it is within the power of the legislature to declare abandonment or non-support of one's wife or child a criminal offense. *See, e.g., Murphy v. State*, 171 Ark. 620, 286 S.W. 871 (1926); *see generally*, cases collected at Annot., *Power to Make Abandonment, Desertion or Nonsupport of Wife or Family a Criminal Offense*, 48 A.L.R. 1193 (1927).

[7] In addition to Georgia, many other states hold that a parent may be tried for non-support in the state in which his child resides, notwithstanding the parent's residence in another jurisdiction. *See, e.g., People v. Jones*, 257 Cal. App. 2d 235, 64 Cal. Rptr. 622 (1967); *State v. Shaw*, 96 Idaho 897, 539 P.2d 250 (1975); *State v. Klein*, 4 Wash. App. 736, 484 P.2d 455 (1971); *Poole v. State*, 60 Wis. 2d 152, 208 N.W.2d 328 (1973); *State v. Wellman*, 102 Kan. 503, 170 P. 1052 (1918); *Ex parte Heath*, 87 Mont. 370, 287 P. 636 (1930); *State v.*

To the extent that Ga. Code § 74-9902(a) has an extra-territorial effect, it comes within an exception to the territorial principle [8] set forth by Justice Holmes:

> "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power." [9]

Georgia's child abandonment statute has several justifications. Most important is the State's "compelling governmental interest . . . [in] the welfare of the children." *In the Interest of J.C.*, 242 Ga. 737 (1978). Surely it is beyond cavil that

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Tickle, 238 N.C. 206, 77 S.E.2d 632, *cert. denied* 346 U.S. 938 (1953); *Osborn v. Harris*, 115 Utah 204, 203 P.2d 917 (1949); *State v. Haworth*, 66 Wyo. 238, 208 P.2d 279 (1949). *But see*, *Hardy v. Betz*, 105 N.H. 169, 195 A.2d 582 (1963) (*contra*). *See generally*, Annot., *Jurisdiction and Venue of Criminal Charge for Child Desertion or Nonsupport as Affected by Nonresidence of Parent or Child*, 44 A.L.R.2d 886 (1955).

[8] The territorial principle takes the position that criminal jurisdiction depends upon the place of perpetration. That is, the state on whose territory the crime was committed has jurisdiction of the offense. Perkins, *The Territorial Principle in Criminal Law*, 22 Hastings L.J. 1155 (1971). During the principle's evolution, confusion arose as to whether the defendant must be present in the jurisdiction in which the offense occurred. *Simpson v. State*, 92 Ga. 41, 43, 17 S.E. 984, 985 (1893). However, this confusion has apparently been put to rest by adoption throughout the states of statutes similar to Ga. Code § 26-301(b), which provides that "a person shall be subject to prosecution in this state for a crime which he commits, while either within or outside the state, by his own conduct or that of another for which he is legally accountable, if (1) the crime is committed either wholly or partly within the state. . . ; (c) a crime is committed partly within this state, if either conduct which is an element of the crime, or the result which is an element, occurs within the state. . . ; (d) a crime which is based on omission to perform a duty imposed by the laws of this state committed within the state, regardless of the location of the accused at the time of the omission." Ga. Laws 1968, pp. 1249, 1261.

[9] *Strassheim v. Daily*, 221 U.S. 280, 285 (1911). Further, in *Skiriotes v. Florida*, 313 U.S. 69 (1941), this Court held that a state had the power to legislate criminal matters occurring without its boundaries

> "the parens patriae must protect the helpless and the innocent. They are the wards of the court, the hope of the State, and the seed corn of the future." *Williams v. Crosby*, 118 Ga. 296, 298 (1903).

As a corollary of this compelling interest is the undeniable burden upon the custodial parent and, perhaps, upon the public treasury, if the child is abandoned. There is no dispute that, if children such as Appellee's are not supported by their parent, they may well have to be dependent upon public welfare for their support.[10]

But beyond the budgetary considerations, and rivaling only the compelling interest in her children, is Georgia's interest in enforcing her criminal laws, the obvious purpose of which is to deter and punish conduct society finds unacceptable. The basic line-drawing process of making

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as to its citizens, providing there was no conflict with federal legislation. The Model Penal Code also goes beyond the common law tradition to permit a state to exercise jurisdiction if "the offense consists of the omission to perform a legal duty imposed by the law of [the forum state] with respect to domicile, residence or a relationship to a person, thing or transaction in the State. . . ." [Bracketed matter supplied] Model Penal Code § 1.03(1)(e)(P.O.D. 1962). George, *Extraterritorial Application of Penal Legislation*, 64 Mich.L. Rev. 609 (1966). *See generally*, Rotenberg, *Extraterritorial Legislative Jurisdiction and the State Criminal Law*, 38 Tex.L.R. 763 (1960).

[10] In January, 1981, there were 232,395 individuals in Georgia, including a total of 167,337 children, who received over $12,600,000 in benefits under the Aid to Families with Dependent Children [AFDC] program enacted pursuant to 42 U.S.C. § 602. Georgia Department of Human Resources Consolidated Statement of Public Assistance, January, 1981. Of the eleven million recipients nationwide in 1974 who were receiving AFDC, 4 out of 5 received public assistance because they had been deprived of the support of a parent who had absented himself from the home. In the 6½ years prior to 1974, families with absent fathers added an overwhelming 4.8 million recipients onto welfare rolls. It was estimated that more than half of these absent parents (approximately 1.3 million) would have paid support if there had been strong child support enforcement. Data extracted from S.Rep. No. 93-1356, 93rd Cong., 2d Sess. 42 (1974), *reprinted in* "Child Support Enforcement Programs," National District Attorneys Association (March 1, 1976).

an act criminal is preeminently the province of the legislature. *Rummel v. Estelle*, 445 U.S. 263, 275 (1980). It is true, of course, that child abandonment is a nonviolent crime, but "the presence or absence of violence does not always affect the strength of society's interest in deterring a particular crime or punishing a particular criminal." *Id.*

There are few areas in which a State has more interest than in the well-being of its children. Appellee does not argue that the State would not be justified in making child abandonment a misdemeanor. But to recognize that Georgia can make child abandonment a misdemeanor rather than a felony "is virtually to concede that the lines to be drawn are indeed 'subjective,' and therefore properly within the province of legislatures, not courts." *Id.* at 275-276.

Just as it may not have seemed "fair" for the defendant in *Rummel* to have received a life sentence for the theft of $120.75 simply because it was his third felony conviction, so it may not seem "fair" for the Appellee to receive a felony conviction for child abandonment simply because he has left the State of Georgia. However, inasmuch as "the length of sentence actually imposed is purely a matter of legislative prerogative," *id.*, at 274, the Georgia General Assembly may rationally have decided that since abandoning parents outside the State have chosen to place themselves beyond the State's jurisdiction and to thus make the continued deprivation of children more likely, the State may impose a more stringent punishment on them.

Further, it is no answer to say that Georgia is the only state which makes a distinction between abandoning parents who leave the State and those who remain behind.

This defense, too, was raised and dismissed in *Rummel v. Estelle, supra,* where Mr. Justice Rehnquist, speaking for the Court, noted that

> "[a]bsent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." *Id.* at 282.

The truth of the matter is that when a parent abandons his child, he has committed a grievous offense not only against his child, but also against the State, and the State is entitled to punish him for that act. And when the parent abandons his child and leaves the State, he has committed a more serious crime, and deserves to suffer a more severe punishment. "In short, the 'seriousness' of an offense . . . in modern society is not a line, but a plane." *Id.*, at 283, n.27. Once the parent who has abandoned his child has placed himself beyond the jurisdiction of the State, he has, in fact, made it difficult, if not impossible, for the State to ever bring him before the bar of justice. Hence, the State is entitled to protect its interests in enforcing its criminal laws by placing a more stringent punishment on abandoning parties who leave the State than those who remain within.

These justifications for Ga. Code § 74-9902(a) are more substantial than the mere budgetary or recordkeeping considerations which were held insufficient to outweigh the constitutional claims of the individuals in *Shapiro v. Thompson,* 394 U.S. 618 (1969); *Dunn v. Blumstein,* 405 U.S. 330 (1972); and *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974). Here, as in *Sosna v. Iowa,* 419 U.S. 393, 406 (1975), the crime of child abandonment is not a matter in which the only interested parties are

the State and a person such as Appellee in the role of a potential criminal defendant. Entire families are interested in, and dependent upon, abandonment proceedings, since without the help of the statute, the custodial parent may not be able to obtain any child support payments from the runaway parent. Without the aid of the statute, the child may, at best, have to face the unpleasant prospect of economic deprivation or, at worst, the humiliation of becoming a welfare recipient or even a ward of the State. With "consequences of such moment" riding on the enforcement of child support obligations, Georgia is entitled to use Ga. Code § 74-9902 to accomplish its compelling interests in preventing and punishing the crime of child abandonment. *See, Sosna, supra* at 407.

Here, again, as in *Sosna*, the challenged statute additionally furthers the State's parallel interests in protecting the integrity of its criminal and judicial processes. Georgia may quite reasonably decide that it does not wish to become a "dumping ground" for abandoned children whose parents think they can escape their duties and any punishment simply because they are outside State boundaries. Until such time as the State is convinced that a lesser punishment would accomplish the purposes of its child abandonment law, it is entitled to use a possible felony conviction in furtherance of its compelling interests.

II. PARENTS WHO ABANDON THEIR CHILDREN IN GEORGIA DO NOT HAVE A RIGHT TO TRAVEL WHICH OUTWEIGHS THE STATE'S COMPELLING INTEREST IN PREVENTING AND PUNISHING THE ABANDONMENT OF CHILDREN.

Appellee challenges Georgia's child abandonment law on the ground that, by declaring that guilty parents who leave the State are felons, whereas those who stay within the State are misdemeanants, the statute violates parents' constitutional rights to interstate travel. Citing cases which seem to broadly assert that the right to travel is a fundamental right always necessitating strict scrutiny under equal protection analysis, Appellee claims that Ga. Code § 74-9902 (a) cannot possibly pass constitutional muster. Motion to Affirm, at 2.

This type of "lock-step" progression which attempts to force Appellant into a "no-win" situation must fail because it betrays a "fundamental misunderstanding of the law" [11] which has developed surrounding the right to travel. Despite the fact that "the concept of that right has not been static," *Maricopa County, supra,* at 280 (Rehnquist, J., dissenting), there is nothing in the decisions of this Court over the past century to suggest that the right to travel encompasses and protects the right of an accused to avoid the consequences of his own misdeeds.

"Although the Articles of Confederation provided that 'the people of each State shall have free ingress and regress to and from any other State,' [12] that right finds no explicit mention in the Constitution." *United States v. Guest,*

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[11] *Dunn v. Blumstein, supra,* at 339.

[12] Art. IV, Articles of Confederation.

383 U.S. 745, 758 (1966). Nevertheless, "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *Id.* Despite "recurring differences in emphasis within the Court as to the source [13] of the constitutional right of interstate travel, . . . [a]ll have agreed that the right exists." *Id.* at 759.

Whatever its previous parameters, it now appears that the right scrutinized is not just the right to move from place to place, but rather

> "[t]he right to migrate, 'with intent to settle and abide' or, as the [*Shapiro*] Court put it, 'to migrate, resettle, find a new job, and start a new life.' . . . Even a bona fide residence requirement would burden the right to travel, if travel meant merely movement." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 255 (1974). [Bracketed matter in original].

To decide whether a law violates the Equal Protection Clause, this Court has said that it will look "in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." *Dunn v. Blumstein*, 405 U.S. 330, 335

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[13] As explained by Mr. Justice Harlan in his dissent to *Shapiro v. Thompson*, 394 U.S. 618, 666 (1969), opinions of this Court and of individual Justices have suggested several different provisions of the Constitution as a source of the right to travel: the Commerce clause (*Edwards v. California*, 314 U.S. 160 (1941); the *Passenger Cases*, 7 How. 283 (1849)); the Privileges and Immunities Clause of Art. IV, Sec. 2 (*Corfield v. Coryell*, 6 F.Cas. 546) (No. 3230) (1825) (Mr. Justice Washington); the Privileges or Immunities Clause of the Fourteenth Amendment (*Edwards v. California*, 314 U.S. 160, 177, 181 (1941) (Douglas and Jackson, J.J., concurring); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (dictum)); and the Due Process Clause of the Fifth Amendment (*Kent v. Dulles*, 357 U.S. 116, 125-127 (1958); *Apthecker v. Secretary of State*, 378 U.S. 500, 505-506 (1964)). *See generally*, Note, *A Strict Scrutiny of the Right to Travel*, 22 U.C.L.A. L.Rev. 1129 (1975).

(1972). Under traditional two-tier analysis, statutes are upheld if they do not arbitrarily discriminate among persons within their jurisdiction, and if there is a rational relationship between the purpose of the legislation and the classification. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). However, in cases where statutes impermissibly interfere with the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976), the state classification will be subjected to strict scrutiny and the state must demonstrate compelling and substantial interests to justify the classification. *Dunn v. Blumstein, supra*, at 335; *Shapiro v. Thompson, supra* at 634.

Since Appellee does not claim to be part of a "suspect class," the question before the Court is whether those parents who commit the crime of child abandonment have a fundamental right which demands strict scrutiny in this case. Or, more particularly, the question is whether parents who abandon their children in Georgia, before or after leaving the State, have a constitutional right to migrate, resettle, find a new job and start a new life in another state, that is of such importance as to outweigh the State's compelling interests in protecting its children and the validity of its criminal laws by preventing and punishing the crime of child abandonment. It is the State's position that the parents' rights in this regard are not so fundamental as to outweigh the State's or to trigger the "strict scrutiny" test, and that the "rational basis" test should be used to evaluate the challenged statute.

Whatever the constitutional rights of persons charged with crimes in other contexts may be, their rights to full and free travel are attenuated. As the Georgia Supreme

Court stated in upholding the same statute under consideration here, "[a] person charged in Georgia with commission of a crime who has left Georgia and entered another state cannot be said to have a constitutionally protected right of free travel in interstate commerce that can be asserted to bar prosecution for the Georgia offense." *Garren v. The State*, 245 Ga. 323, 325 (1980).[14]

Notwithstanding any putative right to travel, a person who commits a crime in one state, and simply goes to another state, is subject to summary and mandatory executive interstate extradition proceedings. *Michigan v. Doran*, 439 U.S. 282, 288 (1978). The Extradition Clause,[15] the federal implementing legislation,[16] and, where adopted, the Uniform Criminal Extradition Act,[17] are all binding on state courts and are all intended to enable each state to bring offenders to trial as swiftly as possible in the state where the alleged offense was committed. *Id.* at 287-88.[18] This Court has long held that to be a fugitive from justice, for purposes of extradition, it is not

[14] The Court of Appeals distinguished the *Garren* case by saying that Garren had been charged with child abandonment before he left the State, and that, therefore, he might well have been fleeing with intent to avoid prosecution and payment of child support. *Helms v. Jones*, *supra*, at 213; A.36. However, an examination of the record in *Garren v. The State*, on file in the office of the Clerk of the Georgia Supreme Court, reveals that the Court of Appeals was in error. The indictment against Garren, which was not issued until February 21, 1979, charged him with abandoning his two children on July 1, 1978, and then leaving the State. Thus, *Garren v. The State* and the instant case present identical fact situations.

[15] United States Constitution, Art. IV, Sec. 2.

[16] 18 U.S.C. § 3182.

[17] Georgia has adopted the Uniform Criminal Extradition Act. Ga. Laws 1951, p. 726, as amended; Ga. Code Ann. Ch. 44-4.

[18] Once a governor has granted extradition, a court considering a case on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in a demanding state; (c)

necessary that the person charged with a crime must have left the state with the specific intent of avoiding prosecution, but simply that having committed a crime within a state, he has then left his jurisdiction and is found within the territory of another. *Roberts v. Reilly*, 116 U.S. 80, 97 (1885). The same construction was also given to the predecessor of 18 U.S.C. § 3290, by which federal criminal statutes of limitation are tolled during the time an accused is "fleeing from justice." *Streep v. United States*, 160 U.S. 128, 134 (1895).[19]

In *Scherling v. Superior Court of Santa Clara County*, 149 Cal. Rptr. 597, 585 P.2d 219 (Cal. 1978) [hereinafter "*Scherling*"] the California Supreme Court (*en banc*) upheld a similar statute of limitation tolling provision [20] by noting that:

> "[t]he Legislature could have rationally determined that the likelihood of detection of the crime and identification of the criminal is greater if the accused remains within the jurisdiction, and that because the result—even if not the intent—of his departure from the state is to render discovery of the crime or the criminal more difficult, the statute of limitations

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whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. *Michigan v. Doran*, *supra*, at 289.

[19] Accord, *Green v. United States*, 188 F.2d 48 (D.C.Cir.) *cert. denied* 341 U.S. 955 (1951); *King v. United States*, 144 F.2d 729 (8th Cir.) *cert. denied* 324 U.S. 1854 (1944); *McGowen v. United States*, 105 F.2d 791 (D.C.Cir.) *cert. denied* 308 U.S. 552 (1939); *but see*, *United States v. Ballesteros-Cordova*, 586 F.2d 1321 (9th Cir. 1978) (*contra*). *See generally*, Annot., *Tolling Federal Criminal Statutes of Limitations by Reason of Flight From Justice Within Meaning of 18 USCS § 3290*, 33 A.L.R. Fed. 716 (1977).

[20] Section 800 of the California Penal Code provides a three-year statute of limitations for burglary; however, Section 802 states that if the defendant is out of the state when or after an offense is committed, no time during which he is absent is to be computed as a part of the limitation period. *Scherling*, *supra*, 585 P.2d at 223.

> should be tolled during his absence." *Scherling, supra,* 585 P.2d at 223.

The defendant in *Scherling* unsuccessfully raised as a defense most of the right to travel cases relied upon by Appellee herein. In upholding the challenged statute, the California Court accurately distinguished those cases, emphasizing that while they

> "instruct us on broad principles, there is clearly a distinction between one who, like defendant, leaves the state after committing a crime, . . . and one who has committed no crime but is deprived of a governmental benefit merely because he exercises his right to travel to another state. In the former circumstance, the State has an interest in assuring that the defendant is available locally not only to enhance the possibility of detection but also to avoid the burdens of extradition proceedings, should he be charged, his whereabouts become known, and he refuses to return voluntarily." *Id.* at 223-224.

So, too, in the instant case, there is clearly a distinction between parents who abandon their children and, for example, the indigents who were denied welfare and medical care in *Shapiro* and *Maricopa County, supra.* Indigency, of course, is no crime; child abandonment is.

The *Scherling* Court also discussed and distinguished *In re King,* 90 Cal. Rptr. 15, 474 P.2d 983 (1970) which had declared violative of the right to travel a statute which increased the crime of child abandonment from a misdemeanor to a felony for persons who *remained* out of the State for thirty days. Although possessing a superficial similarity, *King* is totally inapplicable to the present case, for the California statute did not require, as Ga. Code § 74-9902 does, that a parent must have himself been inside the state and then wilfully abandoned his children before or after he left. The situation deplored

by the *King* Court, that of a father who had never lived in the state, being charged with the abandonment of children brought into the state by their mother, would never come within the purview of the Georgia statute. Thus, the nexus between the abandoning parent and the state is greater in Georgia than it was in California.

Further, as the Court in *King* pointed out, the statute in that case was "*not* one which single[d] out, for greater punishment, nonsupporting fathers who *flee* from California. . . ." *In re King, supra*, 474 P.2d at 990. [Emphasis in original]. In Georgia, on the other hand, although granted that a parent does not have to do so with intent to avoid prosecution, he nevertheless must leave the State. Therefore, the Georgia statute has a much narrower focus than the California law which encompassed fathers who had never been inside the state.

At any rate, insofar as the *King* case might seem to apply to the instant case, Appellant submits that it is simply not good law. The California Supreme Court apparently is also having second thoughts about the *King* rule, for it seemed hard pressed in *Scherling* to avoid having to overrule its decision of some eight years earlier. The *Scherling* Court's rather strained explanation was that "[t]he present case is distinguishable from *King* in that here the defendant is not subject to greater penalty because he left the state; rather, he is faced with a tolled statutory period of limitations." *Scherling, supra*, 585 P.2d at 224. This is clearly erroneous; the simple truth of the matter is that, in *Scherling*, a person who commits the crime of burglary and leaves the state is being treated differently from one who stays in the State. Such is the same situation in Georgia with the crime of child aban-

donment. Perhaps recognizing the fragility of the distinction, the *Scherling* Court emphasized that *King* "did not declare that an accused's right to travel prevails over the state's interest in detecting crime and identifying criminals." *Id.*

Precisely so. An accused's right to travel cannot prevail over the state's interest in preventing and punishing crime.

The only people to whom Ga. Code § 74-9902(a) applies are those who have formed the specific criminal intent [21] to abandon their children. Clearly, there is a difference between them and the people who have been protected in the right to travel cases cited by Appellee and the Court of Appeals.

> "It is important, in applying constitutional principles, to interpret them in light of the fundamental interests of personal liberty they were meant to serve. Respect for these principles is eroded when they leap their proper bounds to interfere with the legitimate interest of society in enforcement of its laws. . . ." *Couch v. United States*, 409 U.S. 322, 336 (1973).

The constitutional principles of the right to travel cases were never meant to serve the interests of parents who commit the crime of child abandonment, and this Court should so hold.

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[21] There are two elements to the crime of child abandonment under Georgia law: (1) desertion, *i.e.*, the willful forsaking and desertion of the duties of parenthood; and (2) dependency, *i.e.*, leaving the child without necessaries. Both elements must be present to complete the offense. *Waites v. The State*, 138 Ga. App. 513, 514 (1976). Thus, there is no question but that specific intent must be found before a defendant may be convicted under Ga. Code § 74-9902.

III. ASSUMING THE EXISTENCE OF A CONSTITUTIONALLY PROTECTED RIGHT TO TRAVEL, THE CHALLENGED STATUTE DOES NOT PENALIZE THAT RIGHT.

Although many state requirements impinge to some extent on the right to travel and migrate, this Court has never declared such requirement to be *per se* unconstitutional. *Maricopa County, supra* at 256. It is only those classifications which operate to *penalize* people who have exercised their constitutional right to interstate migration which demand strict scrutiny and must be justified by compelling state interest. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). Moreover, to be a penalty, an infringement must be "unreasonable," [22] or "impermissible".[23] It is Georgia's position that even if "strict scrutiny" is applied to this case because of the existence of a fundamental right to travel, the challenged statute does not penalize that right.

In assessing the impact the challenged statute has upon an asserted right to migrate, there are, of course, no bright-line tests. It seems apparent that if a state statute contains a durational residency requirement which penalizes a person who has recently exercised a right to interstate travel to the extent that certain "basic necessities of life" such as welfare,[24] and medical care,[25] or a "fundamental political right" such as voting,[26] are totally denied, that statute will be considered a penalty. On the other hand, since higher education is not a "basic necessity of life," it may be provided to residents for a preferential lower

[22] *Shapiro, supra* at 629.
[23] *Murgia, supra* at 312.
[24] *Shapiro, supra.*
[25] *Maricopa County, supra.*
[26] *Dunn v. Blumstein, supra.*

tuition than that charged to non-residents.[27] Furthermore, even durational residency requirements, struck down in *Shapiro*, *Dunn* and *Maricopa County*, are acceptable in certain circumstances, if, for example, they can be met while in student status. *Starns v. Malkerson*, 326 F.Supp. 234 (D.Minn. 1970), *aff'd*, 401 U.S. 985 (1971) cited with approval in *Vlandis v. Kline*, 412 U.S. 441, 452, n. 9 (1973).

Similarly, in *Sosna v. Iowa*, 419 U.S. 393 (1975), a one-year durational residency requirement placed on those who wished to obtain a divorce was not considered so great a penalty on interstate travel and migration as to warrant invalidation. This Court apparently reasoned that since access to the divorce courts had not been "irretrievably foreclosed," but only "delayed," the Appellant's recent interstate travel had not been impermissibly penalized. *Sosna v. Iowa, supra*, at 406.

Here, of course, none of the Appellee's basic necessities of life are being denied, lessened, or even delayed, by the operation of this statute. On the contrary, it is the abandoned children whose interests the State is trying to protect who are the real victims of hardship in this matter: it is they who truly suffer deprivation of the "basic necessities of life."

Indeed, an examination of Ga. Code Ann. § 74-9902 reveals that if the right to migrate to another state is affected at all, it is affected "only incidentally and remotely." *Williams v. Fears*, 179 U.S. 270, 274 (1900). Under the statute, a parent is free to travel and to live at any place of his choosing. The statutory provision only discourages or penalizes migration if the parent has

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[27] *Vlandis v. Kline*, 412 U.S. 441, 452 (1973).

already committed a crime, *i.e.*, if he has already wilfully and voluntarily abandoned his child in the State. If the parent has not abandoned his child when he leaves the State, the statute imposes no penalty on migration, but only discourages the commission of a crime (*i.e.*, the abandonment of a dependent child) once the parent has left the State. Unlike the taxing provision levied on everyone leaving the State in *Crandall v. Nevada*, 6 Wall. 35 (1868), the challenged statute in this case does not reach every person who leaves the State of Georgia; it is narrowly tailored to reach only those persons who have committed, or who will commit, a crime. Unlike the statute which placed criminal penalties on all persons assisting the entry of indigents in *Edwards v. California*, 314 U.S. 160 (1941), Ga. Code § 74-9902 is not geared toward persons in the unfortunate, but blameless, condition of poverty; rather, the statute focuses upon the most blameworthy, the most morally culpable: parents who wilfully desert their helpless children.

Contrary to the assertions of Appellee, Motion to Affirm at 3, this statute does not chill the rights of "good" parents who in all innocence simply want to move to another state to seek employment, education, etc. "Good" parents are no more penalized by the existence of Ga. Code Ann. § 74-9902, than they are by the existence of a summary extradition law, an indefinite statute of limitations, or any one of several other laws which assess heavier penalties on interstate crimes than similar crimes committed entirely intrastate.[28] *See*, Argument II, *supra*.

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[28] *See, e.g.*, 18 U.S.C. § 2312 (transportation of stolen vehicles); 18 U.S.C. § 2421 (transportation of females for immoral purposes); 18 U.S.C. § 1952 (travel in aid of racketeering enterprises).

The truth of the matter is that Ga. Code § 74-9902 is most closely analogous to the "regular" residency requirements (*i.e.*, those which require that a person be a resident at the time of seeking a job, schooling, etc.) which have not been considered penalties by this Court. *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (1976). Just as Philadelphia did not have to give the benefit of government employment to non-residents, notwithstanding their right to interstate travel, so Georgia does not have to favor non-residents in the administration of its criminal laws. To place only the possibility of a misdemeanor sentence on child abandonment by a non-resident parent would be, in many instances, to let them escape punishment for their crime (*see*, Argument IV, *infra*), and thus to place non-residents in a favored position over residents. This Georgia does not have to do. *Cf.*, *Califano v. Torres*, 435 U.S. 1 (1978).

IV. EVEN IF THE CHALLENGED STATUTE IS SEEN AS A PENALTY, IT IS REASONABLY NECESSARY TO FURTHER THE STATE'S COMPELLING INTERESTS IN PREVENTING AND PUNISHING CHILD ABANDONMENT.

In order to serve its compelling interests in protecting the welfare of its children and the integrity of its criminal laws, Georgia, when faced with criminals who leave the State, must, like other states, rely upon extradition, a right considered so important by our forefathers that it was explicitly included in the Constitution.[29] But what the founding fathers did not foresee are the modern-day difficulties faced by a state in attempting to implement

[29] Art. IV, Sec. 2, Cl. 2, United States Constitution; *Michigan v. Doran*, *supra*; *See* text at n. 16, *supra*.

this constitutional prerogative. Due to the discretion inherent in the executive hearings, it is by no means certain that governors of the various states will be amenable to the extradition of members of their community, particularly upon the basis of misdemeanor charges in the domestic area. In the case at bar, even with a felony warrant outstanding, the Florida Governor's office exercised its discretion in 1977 and refused to extradite the Appellee to Georgia. (A.17). It appears reasonable to assume that extradition for misdemeanor offenses would be even more problematical.[30] Moreover, a writ of mandamus will not lie to force a recalcitrant governor of the asylum state to issue a governor's warrant. *Kentucky v. Dennison*, 65 U.S. 66 (1860).

As an additional complication in this day of computers, it is not even possible to use the National Crime Information Center [hereinafter "NCIC"] computer to locate the abandoning parent unless: (1) a federal warrant is outstanding; (2) a felony or serious misdemeanor warrant [31] is outstanding; or (3) the parent is a probation or parole violator meeting the criteria of (1) or (2).[32]

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[30] Technically, of course, a person charged with a misdemeanor is subject to extradition under both Federal and State law, Art. IV, Sec. 2, Cl. 2, United States Constitution; 18 U.S.C. § 3182; Ga. Code Ann. § 44-403; *Graham v. The State*, 231 Ga. 820 (1974). In reality, however, refusal to extradite for misdemeanors is entirely within the governor's discretion. Moses, *Interstate Extradition to Answer Criminal Charges*, 9 S.Tex.L.J. 166 (1967).

[31] Georgia does not have a category of crimes denominated "serious misdemeanors." The only differentiation between misdemeanors is reserved for those of a "high and aggravated nature" Ga. Code Ann. §§ 26-401 and 27-2506.1. Child abandonment has never been included in such a category, and it is doubtful if it could be entered on the NCIC Computer. *Cf.*, *Seaboard Coast Line R.R. Co. v. West*, 155 Ga. App. 391 (1980).

[32] NCIC Operating Manual, Part 7, Section 1, Par. 1.1 (August 1, 1979).

The National Crime Information Center personnel are clearly instructed that:

> "[b]efore entering a record of a wanted person in NCIC, the entering agency must attempt to determine, to the maximum extent possible, that extradition will be authorized if the individual is located in another state. . . .
>
> "In instances where an agency is absolutely certain that the wanted person will not be extradited, the individual's record *must not be entered* in NCIC. Such records are more appropriately maintained in a state or metropolitan system." [Emphasis in original.] NCIC Operating Manual, Part 7, Section 1, Par. 1.1 (August 1, 1979).

Theoretically, it may be possible to use the Parent Locator Services of the 1975 civil Federal Child Support Enforcement Act, Title IV-D of the Social Security Act to search for a parent wanted for criminal abandonment. 42 U.S.C. §§ 651-662. Popularly known simply as "IV-D," the federal act was adopted for the purpose of enforcing the support obligations owed by absent parents to their children, locating parents, establishing paternity, and obtaining child support. *Id.* As a practical matter, however, the primary purpose of IV-D is to enforce *intrastate* support rights assigned to the states by recipients of AFDC. Note, *Interstate Enforcement of Support Obligations Through Long Arm Statutes and URESA*, 18 J.Fam.L. 537, 544-545 (1979-80). Thus, if child abandonment were only a misdemeanor, and if, for example, Florida had a policy of not granting extradition of misdemeanants,[33] parents such as Appellee could never be brought to justice.

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[33] *See*, n. 29, *supra*.

Appellee concedes that "Georgia has a substantial interest in discouraging parents from abandoning their children within her borders, conduct which overburdens their remaining custodian, and can possibly make them public charges." [34] However, both Appellee and the Court of Appeals [35] insist that these interests can be furthered by "less drastic means." [36] In particular, both the Appellee and the lower Court state that the Uniform Reciprocal Enforcement of Support Act [hereinafter "URESA"] [37] provides an adequate remedy for protecting the "fiscal integrity of the State, support of minor children, and extradition of the non-paying parents." [38] Both the Court of Appeals and the Appellee are in error, as an examination of the background and details of URESA procedures will demonstrate.

Prior to the creation and adoption of URESA, the problem of interstate enforcement of duties of support had become acute with the increasing mobility of the American population. A deserting husband was beyond the reach of process in the state where he had abandoned his family, which often had no means to follow him. In addition, welfare departments saddled with the burden of supporting destitute families were often prevented from enforcing the duty of support in the state where the husband could be found, by decisions holding that the duty existed only as to obligees within the state.[39]

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[34] Appellee's Motion to Affirm, p. 2.

[35] *Helms v. Jones*, 621 F.2d 211, 212-13 (5th Cir. 1980); A.34.

[36] *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

[37] Ga. Code Ann. Ch. 99-9A.

[38] 621 F.2d at 212; *see*, Appellee's Motion to Affirm at p. 3.

[39] Commissioners Prefatory Notes, URESA (1950 Act), 9A U.L.A. 751 (1979). In Georgia, although there had long been laws requiring

Since its first appearance in 1950, URESA has been amended twice, in 1952 and 1958, and revised in 1968. With the exception of New York,[40] all states and United States territories have statutes providing for interstate reciprocity in enforcing support obligations modeled after one of the four revisions of URESA.[41] Georgia's reciprocal support statute [42] today is based primarily upon the 1958 national amendment to the Uniform Act,[43] which states that its purposes are to improve and extend by reciprocal legislation the enforcement of duties of support and to make uniform the law with respect to the enforcement of those duties.[44]

Commentators have characterized URESA as quasi-criminal or quasi-civil in nature [45] because it is organized

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fathers to support their children, *See* Argument I, *supra*, at n. 1, there were for many years no laws requiring fathers to make regular child support payments, except where the mother had been awarded an alimony decree. The only way to have a cause of action against the father was for the mother or another third party to pay for the child's necessaries and then sue the father for their expenditures. *Murphey v. Murphey*, 215 Ga. 19, 22-23 (1959). It was to remedy these conditions that the Georgia General Assembly adopted the uniform acts cited in n.46, *infra*.

[40] New York has adopted the Uniform Support of Dependents Law, N. Y. Domestic Relations Law §§ 30-43 (McKinney 1977), which is substantially similar to URESA and permits reciprocity between the various jurisdictions. *See*, Note, *Counterclaims and Defenses Under the Uniform Reciprocal Enforcement of Support Act*, 15 Ga.L.Rev. 143 (1980).

[41] Note, 15 Ga. L. Rev., *supra*, at 145, n. 11.

[42] Ga. Laws, 1958, pp. 34, *et seq.;* Ga. Code Ann. Ch. 99-9A.

[43] Georgia first adopted the Uniform Support of Dependents Act, Ga. Laws 1951, p. 107, which was repealed by an intermediate version of URESA, Ga. Laws 1956, p. 703. The 1956 Act was, in turn, superseded by Georgia's current version of URESA, Ga. Laws 1958, p. 34; Ga. Code Ann. Ch. 99-9A. All citations hereinafter to Georgia's URESA will be to the Georgia Code Annotated.

[44] Ga. Code Ann. § 99-902a.

[45] *See* W. BROCKELBANK, INTERSTATE ENFORCEMENT

into four related but distinct parts: I. General Provisions;[46] II. Criminal Enforcement;[47] III. Civil Enforcement;[48] and IV. Registration of Foreign Support Orders.[49]

However, URESA was never intended to be an exclusive remedy; the procedures it provides are, by its own terms, in addition to, and not in substitution for, any other remedies, Ga. Code Ann. § 99-904a. The existence of URESA should not and does not exclude the alternative remedy of criminal prosecution for abandonment or nonsupport. *Government of Virgin Islands v. Audain*, 366 F.Supp. 710, 712 (D.C.V.I. 1973).

The most glaring error committed by the Court of Appeals in urging URESA extradition as a substitute for a felony extradition is its oversight of the fact that under the URESA adopted by many states the "*obligor may be relieved of extradition* to [the demanding] State if he submits himself to the jurisdiction of the superior court of [the responding or asylum] State and complies with the court's order of support." [Emphasis and bracketed matter added]. Ga. Code Ann. § 99-906a.

OF FAMILY SUPPORT, 29 (2d.ed. F. Infausto 1971).

[46] The general provisions contain a statement of purposes, Ga. Code Ann. § 99-902a, *see* text at n. 43, *supra;* and a definition of terminology, Ga. Code Ann. § 99-903a.

[47] The criminal enforcement provisions of URESA only provide a mechanism for the extradition of a person from one state to another to stand trial under the state's own criminal nonsupport statutes. There are not criminal penalties, *per se*, in URESA. Ga. Code Ann. § 99-906a.

[48] Basically, URESA provides for a two-state proceeding which is commenced by the obligee in the initiating state, with the determination there that the respondent owes a duty of support and that the court of another state may obtain jurisdiction of the defendant or his property. Upon certification to the responding state, the court thereof is supposed to assume jurisdiction, set the matter for hearing, and make the appropriate order. Ga. Code §§ 99-909a-923a.

[49] Ga. Code Ann. § 99-937a.

Although this section represents a minority variation from the official text of the 1958 URESA Amendments, approximately nine other states [50] have adopted language substantially similar to Georgia's. *See*, 9A U.L.A. 765-66 (1979). Furthermore, even though the 1968 URESA section relating to interstate extradition was changed to reflect a different procedure, it still provides that

> "(a) Before making the demand upon the Governor of another state for the surrender of a person charged criminally in this State with failing to provide for the support of a person, the Governor of this State may require any prosecuting attorney of this State to satisfy him that at least [60] days prior thereto the obligee initiated proceedings for support under this Act or that any proceeding would be of no avail.
>
> "(b) If, under a substantially similar Act, the Governor of another state makes a demand upon the Governor of this State for the surrender of a person charged criminally in that state with failure to provide for the support of a person, the Governor may require any prosecuting attorney to investigate the demand and to report to him whether proceedings for support have been initiated or would be effective. If it appears to the Governor that a proceeding would be effective but has not been initiated he may delay honoring the demand for a reasonable time to permit the initiation of a proceeding.
>
> "(c) If proceedings have been initiated and the person demanded has prevailed therein the Governor may decline to honor the demand. *If the* obligee prevailed and the *person demanded is subject to a support order, the Governor may decline to honor the demand if*

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[50] Alaska Stat. § 25.25.050; Del. Code Tit. 13 § 611; Haw.Rev.Stat. § 576-12; Mich. Stat. Ann. § 25.225(7); Miss. Code Ann. § 93-11-13; N. J. Stat. Ann. § 2A:4-30.6; P.R. Laws Ann. Tit. 32 § 3312(a); S.C. Code § 20-7-380; V.I. Code Ann. Tit. 16 § 402.

the person demanded is complying with the support order." URESA (1968 Act) 9A U.L.A. 668-69 (1979). [Emphasis supplied.]

Thus, regardless of which version of URESA has been adopted by a given state, almost all states place conditions on interstate extradition or rendition such that the absent parent can either automatically, or at the discretion of the Governor of the asylum state, defeat a demanding state's attempt at URESA extradition.

Furthermore, the "court's order of support" to which the above section refers is that of the court of the responding state, not that of the demanding state. And the duty of support enforced under URESA is not necessarily that imposed by the law of the demanding state; It is that "imposed or imposable under the laws of any state where the *obligor* was present during the period for which support is sought" which is presumed to be the *responding* state "until otherwise shown." Ga. Code Ann. § 99-907a. [Emphasis added.] The implications of this statutory choice of law are such as may, in certain situations, totally preclude recovery of any support payments, *See, Hardy v. Betz,* 105 N.H. 169, 195 A.2d 582 (1963).

However, even assuming an ideal situation, where Appellee's ex-wife had been successful in using the extradition provision of URESA to bring him into a Florida court, where he agreed, or had been ordered, to pay the full $200 per month originally set by the Georgia court, he could still avoid criminal prosecution in Georgia forever by simply remaining out of the State. Thus, Georgia's admittedly substantial interest in seeing that people who commit crimes within her jurisdiction are "brought to book" can easily be thwarted if reliance has to be placed solely on the extradition provisions of URESA.

The opinion of the Kentucky Court of Appeals in *Hamilton v. Hamilton*, 476 S.W.2d 197 (Ky. 1972) is an excellent example of difficulties encountered in seeking to obtain or to enforce a child support decree. The facts are relatively simple: a husband and wife agreed upon a divorce settlement in 1960; the wife retained custody of their daughter and waived her claim to alimony in exchange for the husband's agreement to pay $200.00 per month for child support. Within a short time, the husband had left Kentucky and was living in Florida. Outside the jurisdiction of the Kentucky court, he summarily reduced his payments from $200.00 to $75.00 per month. The wife later sought to have her Kentucky judgment enforced in Florida under the Uniform Support of Dependents Act [51] only to find that Florida, as the responding state, would neither extradite her husband nor force him to pay more than the $75.00 per month he had been paying for some time.

After twelve long years of litigation, Mrs. Hamilton was finally able to obtain some court-ordered support from her husband, but her case is probably unique in that regard. By 1970, Mr. Hamilton had moved to New Jersey and was working for a New York corporation which also did business in Kentucky, and over whom the Kentucky courts had personal jurisdiction. Based upon those unusual circumstances, the Kentucky court ruled that his wages could be garnished to satisfy the support judgment. 476 S.W.2d at 200-201. Had Mr. Hamilton been

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[51] The applicable statutes of both Florida and Kentucky are based upon URESA. The title "Uniform Support of Dependents Act" in Kentucky is apparently a holdover from earlier legislation formerly in effect in that state; all but the name has been supplanted by URESA. Note, *Enforcement of Support Obligations: A Solution and Continuing Problems*, 61 Ky.L.J. 322 (1972).

a typical drifting absentee father, he probably would have "moved on" once the garnishment had been effected, and his wife would have had to begin anew the difficult process of trying to obtain support payments for their child.

Thus, as the experience of the *Hamilton* case indicates, an attempt to enforce a judgment under URESA can be most unsatisfactory.[52] Custodial parents and minor children must have their claim evaluated in a distant forum and, unless they can bear the expenses of traveling there, the hearing takes place without their having an opportunity to testify in their own behalf. In most cases, the custodial parent and child are represented in the responding state by the county prosecutor's office, and their claim often takes a low priority among other local matters to be handled by the prosecutor.[53] Consequently, even under URESA, a custodial parent and minor children are faced with uncertainty, delay and legal expense in ob-

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[52] Such problems are apparently becoming more and more common under URESA. A Wisconsin study on compliance with child support orders found that "after one year only 38 percent of the fathers were in full compliance and 42 percent were in total noncompliance, *i.e.*, they paid nothing. But at the 10th year compliance had dropped to 13 percent and total noncompliance had risen to 79 percent." Conti, *Child Support: His, Her, or Their Responsibilities*, 25 DePaul L.Rev. 707, 718, n.62 (1976). Another writer found that it was not unusual in URESA cases for a father to explain that he had not paid support primarily because he did not approve of the present conduct of his former wife, even though such approval or disapproval is legally irrelevant to the obligation to pay child support. Yee, *What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court*, 57 Denver L.J. 21 (1979). *See also*, Note, *Interstate Enforcement of Support Obligations Through Long Arm Statutes and URESA*, 18 J.Fam.L. 537 (1979-80).

[53] In Michigan, for example, some 40% of URESA cases filed with county prosecutors offices by nonresident plaintiffs are never pursued (based on the results of questionnaires sent to county prosecutors in the state). Note, 61 Ky.L.J. 322 at 329, n. 34.

taining support.

Thus, contrary to the assertions of Appellee and the Court of Appeals, URESA is not a reliably workable alternative to felony extradition. Not only is it of questionable utility in collecting financial support, it can be a total bar to the criminal prosecution of parents who abandon their children. The State has a right to define and punish anti-social conduct such as child abandonment. *See, Rummel v. Estelle, supra.* To follow the Court of Appeals decision in this case would be to defeat that right, because the right to punish crimes is meaningless without an effective means of bringing criminals to trial.

It is no answer to say, as the Court of Appeals did, that the State's compelling interest argument loses force by an alleged failure of the State actively to enforce its child abandonment statute.[54] In the first place, there is no evidence in the record one way or the other concerning the number or frequency of prosecutions under the challenged statute.[55] Secondly, the State's interests can well be furthered just through the threat of the statute's enforcement. Faced with the potential of a felony conviction, parents may be less inclined to abandon their chil-

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[54] *Helms v. Jones, supra,* 621 F.2d at 213, n.7; A.34.

[55] In response to a question from the Court of Appeals at oral argument, counsel for Appellee herein stated he knew of only three prosecutions, and counsel for Appellant herein said he knew of no others. However, the Court of Appeals was in error to assume from these remarks that there were, *in fact,* few, if any, other prosecutions under the felony portion of Ga. Code § 74-9902. In Georgia, the district attorneys of the various judicial circuits, rather than the State Attorney General, customarily handle criminal matters at the trial level. Since oral argument below, counsel for Appellant herein has endeavored to gather some data regarding the numbers of such prosecutions, but to no avail. Of Georgia's 159 counties, only a few of the larger metro counties have computerized data systems, and even those did not have the information sought.

dren and place themselves beyond the State's jurisdiction. Unfortunate as it may be, there are always some people who need the threat of punishment to regulate their behavior.[56]

In sum, felony extradition is not only "reasonably necessary" *Bullock v. Carter*, 405 U.S. 134 (1972), to accomplish substantial and compelling state interests, it is absolutely crucial; without it, Georgia has, practically speaking, no reliable way to punish the crime of child abandonment by parents who evade the law by leaving the State.

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[56] As one commentator put it: "There are some cases where [extradition provisions] are useful. One is the case of the real rotten egg, the kind of fellow, who, being totally selfish, thinks he can go on siring children with nary a thought about their support and who, when sued, will go on a sit-down strike. It is useless to bring a civil suit against such a man. The benefits received will not pay the freight. So the only way to deal with such a man is through the criminal law." W. BROCKLEBANK, INTERSTATE ENFORCEMENT OF FAMILY SUPPORT, 21 (1960). Apparently, the threat of jail, coupled with other support enforcement efforts, does work. Chambers, *Men Who Know They Are Watched: Some Benefits and Costs of Jailing for Nonpayment of Support*, 75 Mich.L.Rev. 900 (1977).

CONCLUSION

For the foregoing reasons, the Appellant respectfully urges this Court to reverse the decision of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, CAROL ATHA COSGROVE, one of the attorneys for the Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served opposing counsel in this action with three copies of the foregoing Brief for Appellant, by depositing three copies of the same in the United States Mail, with first class postage prepaid, addressed as follows:

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This ____ day of March, 1981.